EXHIBIT
3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ALEXANDER S. WELLER, MD,

Plaintiff,

- versus -

ICAHN SCHOOL OF MEDICINE AT MOUNT SINAI, ET AL.,

Defendants.

----------x

23-CV-4775(PKC)

United States Courthouse
Brooklyn, New York

October 31, 2023
3:00 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR PRE MOTION CONFERENCE
BEFORE THE HONORABLE PAMELA K. CHEN
UNITED STATES DISTRICT JUDGE

APPEARANCES

For Plaintiff: ALEXANDER S. WELLER, Pro Se
250 North 10th Street, Apt. 428
Brooklyn, New York 11211

Attorney for Defendant: AKERMAN LLP
1251 Avenue of the Americas
New York, New York 10020
BY: RORY J. MCEVOY, ESQ.

Court Reporter: Georgette K. Betts, RPR, FCRR, CCR
Phone: (718)804-2777
Fax: (718)804-2795
Email: Georgetteb25@gmail.com

Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

(In open court.)

THE COURTROOM DEPUTY: Weller M.D. versus Icahn School of Medicine at Mount Sinai, et al. Docket 23-CV-4775.

Will the parties please state their appearances for the record starting with the plaintiff.

MR. WELLER: Dr. Alexander Weller for the pro se plaintiff.

THE COURT: Good afternoon.

MR. McEVOY: Rory McEvoy, Akerman LLP counsel for the defendants.

THE COURT: Good afternoon to you as well. Give me one second I'm just pulling up the docket so I can look at a couple of the filings while we speak.

So we're here for a premotion conference on the request of the defendants to file a motion to dismiss. The reason I wanted to meet with the parties is because there are a number of issues that I think are worthy of clarification, even assuming that motion practice goes forward.

And one question I have in the back of my mind is whether or not it makes sense to have or to allow, rather, Mr. Weller to amend his complaint, but let's discuss the various questions I have and then we'll see where we end up.

First of all, Dr. Weller, I understand that you're of course a -- you have a medical degree, you also have a law degree; is that right?

MR. WELLER: No, I'm a third year law student at Brooklyn Law School.

THE COURT: So you're a third year at Brooklyn.

Let me start off by asking you a number of questions. Are all of these claims in your complaint being alleged against all of the defendants or each of the defendants?

MR. WELLER: The complaint, I will admit, should be amended to specify that some of the complaints do not apply to some of the defendants. And I kindly request --

THE COURT: Pull the microphone closer to you, so we can hear you.

So you acknowledge that some of these claims are only applicable to or being alleged against certain defendants, but not all of them; is that right?

MR. WELLER: Yes, that was a deficiency in my pleading and I kindly respectfully request leave of the Court to amend my complaint to clarify the --

THE COURT: To clarify your claim?

MR. WELLER: Yes.

THE COURT: Okay, fair enough. That's part of the learning process I guess for you. We'll discuss that in a moment and maybe you can clarify for me as we go along which claims are meant to be alleged against which defendants.

Now starting off with your unpaid wages claim, and

that's under the F-L-S-A or FLSA and New York Labor Law or NYLL, is your wage claim, your unpaid wage claim based solely on the 30 minutes you say you were owed pay for finishing up the work that you were doing during whatever shift you were on preparing I guess for the next shift to take over, or is there other unpaid time or wages that you're basing your claim on?

MR. WELLER: There is other blocks of time for which I would --

THE COURT: Did you say blocks of time?

MR. WELLER: I mean period, days, certain hours. In addition to the thirty minutes, there were meetings I had with members of the administration for which compensation is arguably due as well as --

THE COURT: Okay.

MR. WELLER: -- time required to vindicate my right to use the internal -- or appeal within the internal structures of Mount Sinai for the proper payment of my wages due.

THE COURT: Right. I did see that in your complaint. In other words, you're claiming that you're owed pay, which I think you requested but were denied, for essentially putting together your request for payment of wages or for other -- or for voicing or putting forth other issues relating to your employment there; is that right?

MR. WELLER: Yes, your Honor.

THE COURT: Then you're saying that there are certain dates on which you were required to attend meetings that you say you were not compensated for.

MR. WELLER: So I had a meeting over zoom with a member of the -- a lawyer from the internal human resources department as well as meetings thereafter with members of the senior administration of Mount Sinai.

THE COURT: Okay. Did you reference those in your complaint?

MR. WELLER: No, your Honor.

THE COURT: So you didn't spell those out?

MR. WELLER: Yes, but --

THE COURT: Okay. Yes, it's good to take some notes on what you might want to do when you amend your complaint.

MR. WELLER: Sure.

THE COURT: And I must confess I don't recall if you mentioned in your response to the PMC request or in your complaint, I think it's in your complaint, the time that you're seeking -- that's right, here it is -- to vindicate your legal right to payment for the 30 minutes, and you specify time I think that you took to email defendants Navid, N-A-V-I-D and Jones-Winter. And so in paragraph 69 I think of your complaint you ask for payment for time you spent vindicating your legal rights and that's in the complaint already, correct?

MR. WELLER: Yes, that's right.

THE COURT: All right, but those are basically the three categories, if you will, of wages that you're seeking, the unpaid wages allegedly for the 30 minutes or so that you took to wrap things up or transition each shift I guess or each time you worked, and then the meetings that you had with HR or other parts of the hospital, and then the time it took you to vindicate your legal rights.

Would those be the three categories of time that you're seeking unpaid wages for?

MR. WELLER: Yes, your Honor.

THE COURT: Now you have a New York Labor Law claim for failure to keep records, that's in your complaint. I'm not sure what the records you're referring to are.

So what were you referring to that you say the defendants failed to keep?

MR. WELLER: So the pay stubs provided by Mount Sinai did not specify the dates of the shifts and the length of the shifts and the rate of compensation of the shift itself or other period of time. It was just a cumulative total for that pay period.

THE COURT: I see. You're saying they didn't delineate the number of hours you're being compensated for.

MR. WELLER: Correct, and for which day compensation was being provided and at what rate.

THE COURT: I see. So instead what you received was a pay stub for a pay period that just had a total number of hours and/or amount?

MR. WELLER: Correct.

THE COURT: Okay. But did it have a total number of hours and then the total salary that you were receiving?

MR. WELLER: For that pay period.

THE COURT: Okay. And the pay periods were what, two weeks?

MR. WELLER: Two weeks or a month, yes.

THE COURT: I see. So to your mind, under the New York Labor Law, they were required to keep daily records of the numbers and the rate at which you were paid?

MR. WELLER: Yes. There has recently been some high profile litigation actually against Amazon with the same claim.

THE COURT: Under New York Labor Law?

MR. WELLER: Yes, Labor Law 195 and 191.

THE COURT: Okay.

MR. WELLER: And the distinction here is that the employees in that case were not alleging that there was any inaccuracies, so there was, based on the Supreme Court ruling -- I forget -- a year or two ago where there was -- the plaintiffs had to show injury in fact.

THE COURT: Yes, I was going to ask you about that.

MR. WELLER: Here, I am alleging injury in fact, because as a result of the defendants' failure to specify exactly which shifts were being compensated and at what rate on the pay stub, I was -- there was significant confusion and it led to difficulty in knowing exactly what I was being paid for in each pay period.

THE COURT: But you're not alleging necessarily that you were -- well, you are alleging unpaid wages, but I think you're not necessarily alleging as a result of not getting this breakdown of your hours and rate of pay on a daily basis that you were necessarily shorted any pay, but rather you're saying it was confusing or kept you from knowing whether you were being shorted any pay, is that fair to say?

MR. WELLER: Exactly. I lacked the knowledge to know exactly what I was being compensated for and it frustrated my ability to ensure the accuracy of the pay stub.

THE COURT: So perhaps it's worthwhile for me to tell you, you might want to make that clear in your complaint as well. I mean, obviously at this point the defendants are getting some notice of that by virtue of this conference, but I don't think there's a clear explanation of the basis for your records related claim under New York Labor Law, so you may just want to explain, especially because you do have to allege some injury, that you're claiming that they owed you under New York Labor Law some breakdown, or you're claiming

that they failed to provide some breakdown of the daily hours and rate of pay and that as a result you suffered from confusion and not knowing whether you were being underpaid.

Then, similarly, just to go back, I think you got this, but you should add what other bases you're claiming unpaid wages for. I think what's missing now is simply the reference to dates of meetings with HR and other components that you say you didn't get compensated for but should have been compensated for.

And then, as we earlier talked about, you'll better specify which claims are being alleged against which defendants and the basis for alleging those claims against those defendants.

Now you also do state a claim or assert a claim for failure to provide time of hire wage notice under New York Labor Law and then you also say you were not provided required notices at the time of termination. Again, I guess I'm trying to figure out what were you not advised of when you were hired? Because you did get an employment agreement, right, and did that not contain the rate of pay and other required information under New York Labor Law?

MR. WELLER: Under New York Labor Law a specific form needs to be provided. It's my understanding that a very specific form needs to be provided to each employee within I believe it's three days of starting as well as a form at the

time of termination or end of employment, specifically relaying information related to eligibility for unemployment benefits.

THE COURT: Well, let's not going go to the termination notice yet. Let's start at the hiring period or at the time you were hired. What are you saying you didn't get, the specific form that says what your wage will be?

MR. WELLER: Yes.

THE COURT: And are you saying that that information wasn't in your employment agreement, or you're just saying that the form that they used to notify you didn't comply with New York Labor Law?

MR. WELLER: The form.

THE COURT: Otherwise, though, did you have the wage information in your employment agreement that you signed?

MR. WELLER: Yes, there was wage information in that.

THE COURT: Okay. Let's turn now to the termination notice. Does the fact that you resigned rather than were terminated, doesn't that affect whether or not you're entitled to this notice under the New York Labor Law at the time of termination?

MR. WELLER: No. Under the -- my understanding of the statute as well as the regulation and sub regulatory guidance from the State Department of Labor indicates that

regardless of the circumstances under which the employee stops working, the same notice must be provided.

THE COURT: Are you making this claim under New York Labor Law Section 196(6) or 195(6)? Because --

MR. WELLER: 196 as well as 12 of the rules and regulations 472.8.

THE COURT: And your interpretation is that it doesn't matter whether or not you were terminated or resigned, you were entitled to notice about unemployment benefits, et cetera, under New York Labor Law 195(6)?

MR. WELLER: Yes, that's correct.

THE COURT: I'm sorry, I said 195(6). You said 196(6), but you're relying on Section 196 subparagraph six?

MR. WELLER: That's correct, and the rules and regulations 12 NYCRR 472.8.

THE COURT: Are you disputing in any way or are you making a claim that you were actually fired rather than resigned?

MR. WELLER: I'm making -- I'm alleging constructive termination.

THE COURT: You are alleging constructive termination. Tell me about -- I notice you did have that claim. What facts are supporting the claim that the environment became so intolerable that a reasonable person would have resigned or left?

MR. WELLER: Yes, your Honor. It's part of my Count Number Five for retaliation under the FLSA and New York Labor Law. Wherein, immediately after I attempted to clarify and vindicate my rights for payment, essentially 30 minutes of time, my direct supervisor, Dr. Kathy Navid, the director of the hospital service and I believe the chief medical officer of the hospital, at first denied I was legally entitled to said compensation and thereafter as I sent her information regarding Mount Sinai's legal duties under applicable case law, she immediately accused me of violating policy on a different day by leaving work early and --

THE COURT: Well, there was an allegation in here that they were going to monitor your times because there was a day when you did leave early, they said, and that's what you're saying gave rise to this intolerable work environment?

MR. WELLER: So the -- I also have -- yes. That I indicated that I felt very uncomfortable with that situation because I felt as if I was being subject to adverse -- materially adverse consequences for having raised the wage and hour claim by being accused of violating policy, by leaving early -- work early on a different day as well as being subject to new hourly reporting requirements not required of other similarly situated physicians.

THE COURT: I don't think that part is in your complaint. Are you saying that somehow they changed the

reporting requirements for you?

MR. WELLER: Yes. Dr. Navid was going to require me to essentially clock in and out and require other, unspecified at the time, reporting or hourly tracking reporting not required of other physicians. Only -- and this only came up immediately after she indicated I would actually be paid for the 30 minutes. It's paragraph -- I'm sorry -- 57.

THE COURT: You're referring to the email?

MR. WELLER: Yes.

THE COURT: I see. Oh, I see, it was part of this email where they said you had left at 4:30, so a little early, and then the first part of that is that they wanted you to sign in and out and mentioned the fact that they wanted to track you I guess by the minute. That's what you're referencing?

MR. WELLER: Yes. Yes, your Honor.

THE COURT: I see. And it's based on that alleged change in the conditions of your employment that you say gave rise to the intolerable working conditions and then resulted in your leaving being a constructive termination.

MR. WELLER: Well, your Honor, so I didn't go into detail about it in the complaint. However, in medicine, in hospitals there's a process called peer review under the 1986 HCQA, Health Care Quality Improvement Act, I'm sorry, which allows hospitals to initiate peer review proceedings that are

highly confidential and protected, in general, against physicians. And it is not unusual and it is not unheard of for hospitals to initiate peer review proceedings against physicians who may be a thorn in the side of management as a way to encourage the physician to leave. And it is almost impossible to stop those proceedings once they begin and they have the potential to cause severe ramifications to a physician's future employability, because it's reported to the NPDB, which is reported to every medical board and future employer. And Dr. Navid, as chief medical officer of the hospital and a member of the medical executive committee, would have that ability to easily critique my management of any patient, there's always variation in management, and initiate peer review proceedings. And so --

THE COURT: But she didn't do that while you were there, right?

MR. WELLER: I was only at Mount Sinai for about --

THE COURT: Three months.

MR. WELLER: -- two months.

THE COURT: Two months. October to December 2022. December 2, 2022, so you're right only two months really.

MR. WELLER: Yes.

THE COURT: So it didn't happen because obviously you were there for a short time and only part time, right?

MR. WELLER: That's correct.

I also have, your Honor, in my possession, prior to filing in federal court this case was previously in state court. During the pendency of those proceedings I did propound a couple of subpoenas on Mount Sinai to which responsive documents were provided to me. There was no objection or motion to quash the subpoenas made in state court at that time. And the emails that I am in possession of demonstrate that Dr. Navid, working with Dr. Jones-Winter -- I'm sorry, with Ms. Jones-Winter and others in administration, were trying to figure out a way to get rid of me.

THE COURT: I'm sorry, what are you basing that on?

MR. WELLER: Emails that are in my possession that were the product of subpoenas that I had propounded on Mount Sinai during the pendency of the proceeding in state court. And the emails demonstrate an intent and a desire by Dr. Navid to figure out a way of getting rid of me.

THE COURT: But because of you're saying you being a thorn in the side of the administration, or because of some work performance issue?

MR. WELLER: No, for having raised these wage and hour issues. The emails are all from the end of November.

THE COURT: Okay.

MR. WELLER: November 2022.

THE COURT: And what do they say? You don't have to read all of them just one you think is most indicative of this

intent.

MR. WELLER: On November 22nd I had emailed Dr. Navid regarding my concern that as a result of imposing these new hourly reporting requirements on me that I'd be paid -- or that they not be imposed, I'm sorry.

THE COURT: What did you say again?

MR. WELLER: That these new hourly reporting requirements I was concerned could be retaliatory.

THE COURT: Right. That's what you wrote on the 21st, I think, of November, at least that's what's in your complaint.

MR. WELLER: Yes. Then on November 22nd Dr. Navid wrote to associate deans at Mount Sinai, quote, This isn't worth it even with the desperate situation. How can I proceed here. And in an email 10 minutes later she stated, quote, The PAs complained about how he is intimidating to them and it's already such a difficult job for them. The quality of his work is fair at best. I need legal assistance to cut ties as this email seems like a good opportunity. Thanks in advance for any help/suggestions.

THE COURT: And obviously it sounds to me like there's some -- there are a few issues being raised there. One is what is alleged as somewhat intimidating conduct towards the PAs, another is -- I forget if she said mediocre at best or fair at best in terms of performance and then what

you're alluding to the email that you sent giving them some occasion to potentially terminate you.

MR. WELLER: Yes. To create pretextual reasons to terminate my employment.

THE COURT: Now if I'm not mistaken, I don't think you included the emails just between Dr. Navid and whoever was on the receiving end of that email. Because I'm looking at your complaint in around paragraph 62 to 66, which covers this date range, and it seems that you included mostly your emails to them and perhaps some responses to you. But did you include some of these other ones? And I apologize if I didn't see them.

MR. WELLER: No. So on page 3, footnote one I indicated that I did not include any evidence that I obtained as a result of the subpoenas in state court in --

THE COURT: That's what you're referring to?

MR. WELLER: Yes.

THE COURT: I see, okay. And it's those emails you say evince their intent to terminate you based on your complaints about their employment practices --

MR. WELLER: That's correct.

THE COURT: -- and the wage issues?

MR. WELLER: That's correct, your Honor, given the extremely close temporal proximity one is left with but the conclusion that there is a causal nexus between my complaints

of wage and hour issues and them wanting to -- conjuring up pretextual reasons to terminate my employment.

THE COURT: But, nonetheless, they didn't actually terminate you, you did resign, but you're claiming that you were constructively discharged because of the intolerable situation they had created by instituting this new and different hourly monitoring system for you, the clock-in, clock-out.

MR. WELLER: It was clear from the tone of the communication that my remonstrations for proper wage payments were not well received and it also appears that having spoken with other employees at the time, PAs, physicians that it was the standard practice at Mount Sinai at the time to only pay for the length of the shift, for example, a 12-hour shift, even though physicians and PAs typically have to stay outside of their shift as to finish up work or give handover, complete paperwork. And Dr. Navid, as she indicated to me earlier, said that the hospital does not pay for that and --

THE COURT: Right.

MR. WELLER: -- I essentially called them -- called her out and said --

THE COURT: No, that I understand. Obviously, that's your unpaid wage claim and you're alleging that the protected speech you engaged in was complaining to them about the failure to pay those wages along with some other hours

that you say you were working or dedicated to an issue relating to work and didn't get paid for, so I understand all that.

Again, I'm just trying to clarify really for the purpose of any motion practice, what the basis, the factual basis of what your claims are. Because, as you know, the way I would assess a motion to dismiss is to look to see if your complaint actually is sufficient to allege the many claims that you're bringing and if you don't include the factual bases or allegations, then the complaint might be dismissed, even though you may have the information. So it may behoove you again to amend to include reference to what you say or suggest are perhaps smoking guns about the intent to terminate you perhaps in retaliation for your complaining, but also as some indication of the intolerable environment. Because I think you're suggesting that they instituted these practices for the purpose of trying to make you leave, namely, watching you more closely in terms of your hours.

Let's turn for the moment, then, to your Sherman Act claims. They strike me on the surface as being a bit of a reach here. Are your Sherman Act claims based on the noncompete agreement that exists in the standard contract that prospective physicians sign?

MR. WELLER: Yes. My position is that the concurrent noncompete that was contained in the employment

contract -- sorry, the employment agreement represents essentially a naked per se horizontal territory allocation agreement between horizontal competitors.

THE COURT: Can I ask you, though, one basic question, do you have standing to challenge that practice given that you were permitted to negotiate around that noncompete provision because you were allowed to work at other places after you raised the issue with the defendants.

MR. WELLER: So I was only permitted to continue working at essentially one hospital, Jacobi Medical Center, however, the way the noncompete was structured is that without the prior permission of the hospital, the chairperson of the department, I was prohibited from working at any hospital or any clinic anywhere in the world as a part-time per diem hourly employee who would work approximately four to six shifts a month for which there is -- yes.

THE COURT: So you are arguing a per se violation of the Sherman Act with respect to this noncompete provision in the standard agreement?

MR. WELLER: Correct. So even -- so it could be analyzed under a Section 1 claim as a naked per se horizontal territory allocation agreement, market allocation agreement ala *Topco*, or *State Oil v. Khan*, but it could also be a Section 2 claim given Mount Sinai has significant market share and this would be monopolization behavior.

I would note that the FTC and the DOJ recently, in the past couple of years, have expressed their interest in interpreting the Sherman Act as to be more -- into -- encompassing the types of claims that might be concerning under this agreement to restrain the activities of a part-time per diem physician from working at any other hospital without the permission of the hospital.

Furthermore, I would just clarify that we're both vertical, there's a vertical element and an horizontal element. In that the horizontal element comes in where that Mount Sinai provides primary care services, they have clinics all throughout the city that provide family medicine, internal medicine services. I am also a board-certified internist, so I would provide the same services, out-patient primary care services. So what this agreement actually does, in fact, is prohibit me from hanging out my own shingle and opening up my own primary care office, or working for another hospital or out-patient clinic that could compete with Mount Sinai's primary care clinics.

THE COURT: But what about the vertical aspect of it, I'm not sure I understand. I understand the horizontal part.

MR. WELLER: So the vertical aspect is more the traditional employer/employee relationship.

THE COURT: Just the standard, you can't work

anywhere else and we basically own your time.

MR. WELLER: Correct. As employment agreements are usually thought of as a vertical agreement, but the DOJ in a statement of interest they filed in a case in Nevada, I believe the citation is in the complaint, are encouraging or advocating a reevaluation of that traditional conception of Section 1 of the Sherman Act to include physicians as horizontal competitors to health systems.

THE COURT: But is the only, I guess, authority you're relying on for your theory about horizontal competition that DOJ, I think you called it a statement of interest, is that the only authority you have?

MR. WELLER: No, your Honor. So I also will rely on Supreme Court rulings such as the famous *Barber v. Barber* case, *Palmer v. BRG*, where the Supreme Court held that the practice of allocating markets are subject to the per se rule.

I will also rely on *State Oil v. Khan*, which indicated that some types of restraints have such predictable and pernicious anticompetitive effect, and such limiting potential for procompetitive benefit, that they are deemed unlawful per se, and the per se rule is confined to restraints such as price fixing, bid rigging and market allocation. Restraints that tend to or that would always or almost always tend to restrict competition and decrease output. That's based on Leegin from 2008. But all this really just goes back

to -- it's all based on *Topco* as a horizontal market allocation scheme.

And then in *Topco* from 1972, the Supreme Court did indicate that categorically unreasonable restraints include horizontal agreements to allocate territories.

THE COURT: Well, I guess then let me go back then maybe a step further because the defense intends to argue that your complaint fails to allege an agreement between two separate entities. They, of course, cite the case of *Copperweld*, one word, *Corporation* and in that case it was a situation involving a parent and a subsidiary and they couldn't be deemed to be separate entities for purposes of conspiring under Section 1 of the Sherman Act.

Now you said, and you invoked a moment ago Section 1. What are the two separate entities or persons, I guess, for the Section 1 analysis such that there is a conspiracy?

MR. WELLER: So a Section 2 claim does require an agreement and a --

THE COURT: No, Section 1 I think is the conspiracy claim, am I wrong about that?

MR. WELLER: A Section 1 claim, it's my understanding, can include unilateral actions.

THE COURT: No, I don't think that's right. I think Section 1 is a conspiracy and you have to allege entities are

separate persons for a Section 1 analysis. But whether it's a Section 1 or Section 2 I guess my question is, what are the two separate entities you're alleging here?

MR. WELLER: So -- yes, I do acknowledge that they cited to *Copperweld* from 1984 I believe.

THE COURT: Right.

MR. WELLER: However, I would draw the Court's attention to Needlepoint, which indicated that the determination of whether a parent and a possibly related entity is a fact intensive inquiry.

THE COURT: But what are those even in this scenario, who is the parent and the related entity?

MR. WELLER: So the Icahn School of Medicine as between Mount Sinai Hospital, the various defendants that are named.

THE COURT: So you're saying the Icahn, I-C-A-H-N, School of Medicine and then Mount Sinai are the two separate entities that are conspiring?

MR. WELLER: Well, also for the Section 1 claim it would be the unilateral action. Furthermore -- I'm sorry, the unilateral action of Mount Sinai and the Icahn School of Medicine. The Section 2 claim would be between Mount Sinai and every -- I'm sorry. The Section 2 claim can include unilateral actions, see Aspen Ski.

THE COURT: Right. But you keep switching to

Section 2. Again, I'm just talking about the conspiracy alleged under Section 1. And the purpose of the Sherman Act obviously is to prevent potential competitors from conspiring in some way I think to effect the market or somehow unfairly exercise some market advantage. I mean, I think that's sort of the purpose and that's why you have to allege two separate entities and not related entities or parents and subs, and so that's what I'm trying to get at because I think the defendants have an argument here. It seems like your conspiracy is the defendants and the prospective physicians, but they're clearly not conspiring because you are alleging that the prospective physicians are the ones who are, in some ways, the victims of this alleged Section 1 conspiracy, or at least that's what I understand your complaint to be.

MR. WELLER: So my point would be under Section 1, unilateral actions of the horizontal territory market allocation agreement.

THE COURT: I'm sorry, but, again, a conspiracy -- maybe you and I are talking at cross purposes, you are alleging a conspiracy.

MR. WELLER: Well, I'm alleging a claim under Section 1 of the Sherman Act --

THE COURT: Right.

MR. WELLER: -- which it's poorly -- the way it's been interpreted, it's my understanding by the Courts in the

past 120 years, is that Section 1 claims can...

THE COURT: Perhaps we can move on. I mean, the bottom line is I think you're going to have some difficulty until you can sort out your theory. If you are going to allege a conspiracy, you obviously have to have members of the conspiracy, one or more -- I mean, sorry, two or more. So the question and I guess the potential flaw I guess or defect in your argument is going to be that you haven't identified two separate entities that conspired together to violate the Sherman Act.

You may, as you suggest, have a different claim under the Sherman Act, which has to do with monopolization or monopolistic behavior I guess based on the argument that somehow Mount Sinai or the Icahn School of Medicine are so large that their unilateral action, I guess, could violate the Sherman Act with respect to this noncompete agreement. But I don't think you've alleged or can allege a conspiracy, at least based on what I've seen in the complaint so far. But that's something obviously for you to consider because the defense is certainly going to attack that proposition. But just consider that because I think that there's some seemingly evident problem with a conspiracy claim under the Sherman Act.

Let's move on to the last catchall claim that you have and I think your statement at the outset of this discussion suggests to me that you understand that you need to

spell out the different causes of action that you're alleging and to whom or at which defendants you're alleging them against, but you have here a catchall claim for breach of contract, constructive discharge, fraud, and promissory estoppel, breach of implied covenant of good faith and fair dealing. Those all have different elements and I think you have to at least clearly allege what the facts are that you say support those various claims in order, one, to give fair notice to the defense and, two, to enable them to challenge it, if appropriate, on a motion to dismiss. And again, it doesn't seem to me, although I can't quite tell, which defendants you would include in all of those claims, but again I think you need to spell that out.

You can't really have such a thing as an omnibus or catchall, grab bag assortment of claims, you do have to specifically allege them and separately allege them so that the sufficiency of each of those claims can be assessed by me and by the opposing party.

Let me turn now to you, Mr. McEvoy, for a moment.

MR. McEVOY: Sure.

THE COURT: Is it your intention to move to dismiss all claims against all defendants?

MR. McEVOY: Yes.

THE COURT: So there is no claim that you think, for example, the unpaid wages claims that might, that you think

might survive?

MR. McEVOY: No, and let me point something out. We just heard a long dissertation about the Sherman Act and the Sherman Act claim, I heard Dr. Weller say, is based on his constructive -- or rather his noncompete claim.

THE COURT: Right.

MR. McEVOY: There is no noncompete. The agreement that Dr. Weller signed says, and I quote, You agree that you will not engage in any other clinical activity outside of your employment with the faculty practice, except for your existing employment at Advanced Wellness Services located at 1244 Dickinson Drive, Yardley, PA 19067. You agree to notify the chairman of your department if your employment arrangement outside of Mount Sinai change from your existing arrangement. Any violation of this provision will void your contract with ISMMS. And the operative sentence is, you agree to notify the chairman of your department if your employment arrangements outside of Mount Sinai change. There is no requirement that the hospital agree, approve, authorize. Dr. Weller was free to work wherever he wanted as long as he notified the chairman of his department that that was what he intended to do.

So all of this, whatever it is, about the Sherman Act and about conspiracies and horizontal and vertical, none of it gets anywhere because there's no noncompete. And Dr. Weller cited in his complaint, because his agreement says

it is subject to the standard terms and conditions applicable to part-time physician employment, Section 4 of that agreement in subsection or paragraph -- part F says that under the employment agreement, the physician may not accept an appointment or other position at any other educational, medical or scientific institution, school of medicine, hospital, research organization, college or university or maintain a clinical practice outside Mount Sinai other than described in the cover letter and position description unless prior written approval has been granted by the chair. In the event that the physician wishes to assume another position and maintain a role at Mount Sinai, we may consider a revised agreement.

But what Dr. Weller didn't cite in the complaint is the very next paragraph that says, relevant here, If any provision of the physician's employment agreement conflicts with any provision of the foregoing policies, the provision of the employment agreement shall control.

So the operative controlling provision is Section G, outside employment, which only requires notification.

So any amendment of the Sherman Act claim, the constructive -- the noncompete claim would be futile.

THE COURT: But didn't you just say it requires approval though by --

MR. McEVOY: No, that was under -- there is a

standard group of policies that applies to part-time physicians. One of those policies says you need prior written approval to take a job outside of Mount Sinai. The very next paragraph says, if there's a conflict between that policy and the provision in the employment agreement itself --

THE COURT: Oh, I see.

MR. McEVOY: -- the employment agreement controls. And all the employment agreement requires, in one simple sentence is, you agree to notify the chairman of your department if your employment arrangement outside of Mount Sinai changes from your existing arrangement.

So any leave to let Dr. Weller amend his noncompete claim upon which his Sherman Act claim is predicated, as are some other claims, would be futile because we'd be right back here making the same argument.

THE COURT: Well, I mean I guess on a motion to dismiss you'd have to argue that the employment agreement and perhaps that policy manual are incorporated by reference, because as you point out some portion of what you recited isn't in the complaint and I don't know if the notice provision is in the complaint, but obviously in order for me to consider that fact --

MR. McEVOY: I'm sorry, your Honor, Dr. Weller attached both of the agreements that I just quoted from as exhibits to his complaint.

THE COURT: Okay. So let me ask you, then, a couple of more questions.

MR. McEVOY: Sure.

THE COURT: In your letter you do say, I think, that you're going to dispute whether the plaintiff has sufficiently alleged that the defendants are employers --

MR. McEVOY: Uh-huh.

THE COURT: -- within the meaning of both the FLSA and New York Labor Law. What exactly do you mean or what do you intend to argue? Because I think that you may have a difficult road on that one given the basic understanding of what an employer is --

MR. McEVOY: Well, yes.

THE COURT: -- which is different than saying that they were directly involved in his -- the alleged illegal activity.

MR. McEVOY: But the basic concept of employer is, in most situations, not an individual. You can't lump everybody together and say they're employers. I mean, Dr. Weller was employed by Mount Sinai Queens Hospital under whatever arrangement there was, he wasn't employed by Dr. Navid, or Ms. Jones-Winter, he wasn't employed by those people. Those people work for people that may very well and probably are employers, but they themselves are not employers.

THE COURT: But is it fair to say, though, that they

did decide hiring and firing and pay decisions relative to Mr. Weller and his position, because obviously it doesn't simply mean the person who owns, in some sense, the company.

MR. McEVOY: No, no, that's fair. They certainly were involved in negotiating -- the reason I'm hesitating is that in the one sense you're correct, but it's not like any of these people could simply go out and say okay, fine, Dr. Weller, you're hired. There are procedures they needed to follow, there were approvals they needed to get. There were signatures they needed to obtain. As a matter of fact, Dr. Weller's contract at some point was signed by Ken Davis, who is the CEO of the entire Mount Sinai health system.

THE COURT: Right.

MR. McEVOY: So it's, I think, overly simplistic to simply say, well, because Dr. Navid or Clarissa Jones-Winter were involved in his hiring, then say that they therefore had the authority to hire and fire. Even from what Dr. Weller was quoting, although I think he made too much of it, Dr. Navid went to Clarissa Jones-Winter -- who is an HR person basically, she has an associate in title but she's in human resources -- for advice on how to handle a particular situation. I don't think it was a conspiracy to get rid of Dr. Weller. It was, these are the facts, this is what we know, and it is pretty much the standard practice at Mount Sinai that where there is an issue about termination or

nonrenewal, that those things go to human resources for their review and approval to ensure that policies are applied uniformly throughout the organization.

THE COURT: Well, I think the difficulty I'm having with your argument is two-fold. One is I think it almost ignores reality that these defendants didn't have some substantial role in whether or not Mr. Weller was hired or fired and the conditions of his employment, including what he claims was retaliatory monitoring of his hours and the definition, as you I'm sure are aware, of employer under both of these laws is pretty expansive.

MR. McEVOY: Uh-huh.

THE COURT: And ultimately, the second issue I have is, there has to be some employer because clearly he was employed. So perhaps this is a fight about name only. At some point there is an employer and whoever the employer is, assuming there is one, I guess the question then I want to ask you is, what would be your argument against his unpaid wage claim, assuming for a moment that there has to be an employer or at some point he can name somebody within this organization, if not the organization itself, as his employer.

MR. McEVOY: Sure. The unpaid wage claim, as I hear it, and I read it in the complaint, is based on two things.

THE COURT: Well, there are three I think, but let's --

MR. McEVOY: Well, okay.

THE COURT: -- based on today's conversations there seem to be three categories of unpaid wages.

MR. McEVOY: Well, one is the half an hour of time.

THE COURT: Right.

MR. McEVOY: And that in itself is its own story because the hospital determined that Dr. Weller left a half an hour early. People saw him leave a half an hour early, but he put in a time sheet that he worked for an extra half an hour. And then he says that he did a half an hour of work before his shift started for which he wanted to be paid.

THE COURT: But these are factual disputes. The problem is he's alleging that he got -- he worked an extra half an hour that he wasn't compensated for. I understand at the end of the day you may win based on the records you have, but his claim -- and let's just address the claim, are you saying there cannot be a FLSA or New York Labor Law claim if someone says, I spent a half an hour wrapping up whatever I was doing on my shift and transitioning for the next one for which I wasn't paid, and this is sort of akin to the lunchtime dispute that you've probably seen. Wouldn't that give rise to a viable claim even if on the facts it ultimately isn't going to win?

MR. McEVOY: Well, yes and no. There are any number of emails in which Dr. Weller is asked, Did you work from 4:30

to 5 o'clock? And in response to those we got a dissertation about, well, are you saying that when I say goodbye to somebody at 4:30 that means I didn't work? Never did Dr. Weller say, yes, I worked till five o'clock. The reason you thought I left was X. He danced around it repeatedly. Well, if you're asked if you worked till 5 o'clock and you don't say you did and you don't, then simply on the documents -- and again the emails are reproduced in this complaint to a large degree, and so the hospital would rely on those same emails for that proposition.

And not to get off this topic, but lest I forget, listening to Dr. Weller talk about his constructive discharge claim, if everything he says happened is true, that he was retaliated against, he engaged in protected activity that doesn't state a constructive discharge claim. There are plenty of people who sue claiming they've been subject to a hostile environment, they've been retaliated against. A constructive discharge claim requires a lot more than that.

THE COURT: In terms of the reporting or exercising First Amendment speech -- or protected speech I should say?

MR. McEVOY: Well, I'm not sure what protected speech we're talking about here.

THE COURT: Well, I think the recent case law suggests that reporting internally or complaining internally might be enough, so that's --

MR. McEVOY: Okay, but your Honor, assume it's protected speech. A constructive discharge claim requires that the employer has intentionally made the working conditions so intolerable that a reasonable person would feel compelled to resign. The working conditions need to be intolerable and it has to be intentional. Basically, to put it in layman's language, somebody had to sit around and say let's make this guy quit. Let's make him so miserable that he'll leave. This doesn't come close to that either in the complaint or in Dr. Weller's description of what it is is the basis for a constructive discharge claim.

THE COURT: Right.

MR. McEVOY: It may state a retaliation claim, although I have problems with that as well, but it certainly doesn't state a constructive discharge claim.

THE COURT: Right. Let me say this. Overall, I tend to agree with you on a few things. I do think that -- and I'm saying this to you, Mr. Weller, I don't see how you've sufficiently alleged a constructive discharge claim. What you're saying is that they were imposing clocking in and clocking out in response to your complaints about not getting paid a half an hour you were owed. It seems to me that somehow monitoring a worker's hours, when the person is paid by the hour, is not something that really constitutes intolerable, but I think as even Mr. McEvoy acknowledges, it

might be considered retaliatory if it's only applied to you and if it obviously occurs in close proximity, as it had to since you only worked there for two months, to your complaining about the pay or wage issue. Even though you cited these emails, you didn't have those at the time, obviously you got those after leaving and once you started suing, so it's not as if that information or what you describe as an intentional effort to get rid of you was part of the environment. You may have had your suspicions but I wouldn't count those towards or as part of the evidence to show an intolerable set of work conditions, because the standard for that is fairly demanding and given the short amount of time you were there and short amount of time that this new policy was implemented against you, it seems like it was maybe a week because I think you were citing emails from November 22nd and you quit on December 2.

So I would, just speaking frankly with you, I'm not sure that claim would survive I think for the reasons that we've discussed and that Mr. McEvoy has mentioned.

However, I think, Mr. McEvoy, I'm not in agreement with you about the unpaid wages claim as well as the retaliation claim surviving, even though I acknowledge at the end of the day the evidence may not bear out those claims for the reasons that you said, but again, as you know, I have to look at the complaint to see if it sufficiently alleges these

two claims. And what I do see being alleged is, even looking at those agreements we talked about to the extent they are relevant, he claims he worked an extra half an hour every shift and didn't get paid for it. You say that the records don't bear that out that, in fact, he clocked out a half an hour early or that he actually left half an hour before his shift was over but was paid for the whole shift so, therefore, he was compensated for the 30 minutes, but I can't consider that right now. In other words, I can't resolve that factual dispute.

So some part of me wonders if it would be a better use of everybody's time to simply let the claims that seem to be potentially viable at this point go through, the unpaid wage claim under both federal and state law, and the retaliation claim under federal and state law. The termination claim I don't know enough about in terms of the law because I still, based on some preliminary research, don't think you're right, Mr. Weller, about whether or not you're entitled to a termination notice since it appears you resigned and, as we've just discussed, I don't think you can make an argument you were constructively discharged for purposes of that provision of the New York Labor Law, but you say it doesn't matter. Obviously, I could hear argument on that or see that in your briefing.

And then in terms of the notice upon hire of the

wage claim that you have, I have some questions about whether or not your form argument or basis for your claim is viable. I mean, I think here it would be difficult for you to claim injury and standing, I think if nothing else, because you were informed in your employment agreement what your wage was going to be.

So just so you know I've issued a number of decisions in the context of New York Labor Law finding that if you cannot allege some kind of cognizable injury, and I don't think confusion would even count here because you couldn't have been confused, you had an employment agreement, but even if I were to acknowledge a confusion could constitute some sort of injury, I don't think you have standing, putting aside whether or not the form of it is really -- would be enough for the New York Labor Law claim. So I have some doubts about whether either of your New York Labor Law notice claims, the hiring wage statement or the termination notice claims would work -- would survive rather.

The Sherman Act claims I really just don't see those as surviving, in part, for the reasons that you and I have discussed. You're missing a party for the conspiracy and then I think Mr. McEvoy makes a very good point that if your Sherman Act claim is based on this noncompete issue, you're going to have a tough time with the noncompete clause or provision argument because it doesn't sound like you were

prevented from competing. It doesn't even sound like the standard policy, even if that could be said to apply to you given that you did negotiate outside employment, bars working somewhere else. It only seems to require notice.

Now, maybe you read the documents differently and maybe that would be the basis for your noncompete claim and maybe then by extension a Sherman Act claim, but not alleging conspiracy. But all of the claims that we're discussing now, other than the unpaid wages and the retaliation claims, I see a great possibility that those will be dismissed no matter what you try to allege because I think the law doesn't quite support it or the facts don't support it.

So, part of the reason I hold these conferences is to give both sides some initial assessment of my -- or my initial assessment of the claims or the motion.

So what we'll do is, I certainly will allow you, Mr. Weller, if you want to amend your complaint, though I think you should -- or you would be wise to do some trimming as well as some adding of allegations to support your claims. But like I said, I'm trying to give you some view of what I think is a realistic outcome here. You seem to have a couple of potential claims that can go forward, but a lot of the other ones I have serious doubts about it.

You, again, have this catchall claim. I don't know about breach of contract and all that. Those seem to me -- I

don't understand the basis even of the breach of contract because they didn't fire you unless I were to find you were constructively discharged, so I'm not quite sure how you're saying that they failed, meaning the defendants or the hospital failed to comply with what was required under the contract with you. Is it the constructive discharge essentially that drives that claim?

MR. WELLER: So a couple of things. I find the defendants' contention about applicability of the FLSA to be a little perplexing given the Second Circuit ruling in *Irizarry versus Catsimatidis*.

THE COURT: You're talking about the employer issue.

MR. WELLER: Yes.

THE COURT: I wouldn't get hung up on that. At the end of the day there's going to be an employer you can sue. And I also think I've intimated that I'm not sure I agree with Mr. McEvoy about his more narrow reading of who is an employer. I've written decisions where I found that supervisors, for example at a restaurant, who determine the hours and the wages, for the most part, or recommend hiring and firing as a supervisor and certainly some of these people qualify as that, are employers. So I don't find that they have to either own the entity or be the heads of the entity in order to be an employer. I'm not sure actually about Dr. Charney, however, because it seems to me it's not clear

based on what you've alleged that person was the employer, but I think under Mr. McEvoy's theory maybe he is the employer because he's the dean at the school. But I don't think there's going to be any real argument that FLSA does apply, that they were your employer, whoever that person or entity is, so I think, as I said to Mr. McEvoy, I think that's just a name thing. There has to be an employer here. That's not the issue.

The question really is whether or not you're entitled to make some of these New York Labor Law claims mostly, the ones about notice and also the noncompete agreement, which is part of your constructive discharge claim, I think, or part of your Sherman Act claim, sorry, and separately the constructive discharge I think I've given you an idea that it's hard for me to find, it would be very hard for me to find that you've alleged enough for that claim when you're talking about a week's worth of theoretical or proposed greater scrutiny of your hours, that's really what it amounts to.

MR. WELLER: It was also an allegation that I had violated policy by leaving work early and attesting an incorrect time sheet.

THE COURT: But you don't think an employer is allowed to do that without creating an intolerable work environment even if you dispute it?

MR. WELLER: Under the Supreme Court standard elucidated in Burlington Northern Railroad in 2008, the standard is if the employers actually would have the tendency to dissuade a reasonable employee from raising a claim. To allege an employee violated a policy in -- an employer's policy of wage and hour -- or any policy in the same --

THE COURT: But you're talking about the retaliation claim --

MR. WELLER: Yes.

THE COURT: -- not the constructive discharge claim.

MR. WELLER: So I will allow that the standards under New York law or the common law standards in New York for constructive discharge would be a bit more --

THE COURT: Onerous.

MR. WELLER: -- onerous and challenging to meet compared to the FLSA and New York Labor Law retaliation standards.

THE COURT: Right. So let's do this.

Mr. McEvoy, obviously at some point if you want to file your motion you will of course be allowed to because I can't say you cannot, but I do want to counsel you to try to save time and money for yourself and your client. What I want to do is have Mr. Weller first amend his complaint both to add facts or allegations, factual allegations that would better support his claims, but also then specify as to which

defendants are being charged not to say in every claim all defendants, and then to consider I think trimming, for example, the Sherman Act claim and I would say the constructive discharge claim as well as the notice claims. Those would be my --

MR. McEVOY: And how about the noncompete, your Honor?

THE COURT: Right. But the noncompete, is that a -- that's a state law claim I guess just based on, it seems to be -- it seems like it undergirds the Sherman Act claim a little bit.

MR. McEVOY: Well, but the problem is, you know, I realize that we are all going to cite cases and Dr. Weller seems well versed in them, notify means notify, it doesn't mean anything other than notify and it's got a pretty clear definition in common English understanding and if all it says is Dr. Weller was required to notify his chair that he was accepting another job somewhere and it didn't require any approval by anybody, then --

THE COURT: Right.

MR. McEVOY: -- leaving to amend that complaint is futile.

THE COURT: Well, let me just say this. I am looking at I guess his claims and there is the Sherman Act which I think is based on this noncompete notion, and then

there is the eighth cause of action which is a catchall claim for breach of contract, so that's where I agree you should consider dropping your constructive discharge claim for the reasons that we've discussed. I think it would be near to impossible for you to convince me that you can sufficiently allege such a claim under the facts, as I understand them, and I think I've gotten a better understanding of them.

MR. McEVOY: Yes, but, your Honor, I'm talking about the noncompete, not the constructive discharge.

THE COURT: Oh, I'm so sorry, you're right. Now that I think about it, there isn't a freestanding noncompete, you're right, that really is just part of the Sherman Act claim. Am I right, Mr. Weller?

MR. WELLER: So the number one in paragraphs 23 and 24, my esteemed opposing counsel's characterization of the agreement is slightly different, he left out one sentence. Any violation of this provision will void your contract with the Icahn School of Medicine at Mount Sinai.

THE COURT: Right, but that's the provision where you have to tell them if your work circumstances change.

MR. McEVOY: Yes. It means -- sorry. I mean, if Dr. Weller goes out and takes another job and doesn't tell the chair before he does it, then he's violated the agreement. As long as he notifies the chair, he hasn't violated the agreement. It doesn't seem complicated.

MR. WELLER: I would add that would impose an obligation on the employee, which as a part-time per diem employee has essentially no function, I would just work when needed a couple of shifts a month. In a part-time per diem employee has no duty to tell their employer that they have another job and it's --

THE COURT: Well, if the agreement says they do, then they have a duty.

MR. WELLER: Right, but --

THE COURT: Your argument is that somehow that requirement violates the Sherman Act, where it's non -- it's uncompetitive.

MR. WELLER: Well, not just that but more so the standard terms and conditions of the part-time physician employment, which prohibits maintaining a clinical practice outside of Mount Sinai.

THE COURT: Right, but I think that unless there's another provision, and you had one in your agreement that overrides that, and that's I think what Mr. McEvoy is saying. So that is not an unqualified restriction because it apparently has a second clause or another sentence which says, if you have something else, which apparently you did in your part-time contract with Icahn School of Medicine, that overrides the absolute bar on you working somewhere else, then you can work somewhere else so long as you give notice.

MR. WELLER: Sure. That's based on the construction where my esteemed opposing counsel's construction of the agreements that such that there would be a conflict, but notifying and prohibiting practice is not clearly -- it's not clear that's there's a conflict therein.

MR. McEVOY: Just two quick things, your Honor. One is there is a separate count regarding the noncompete, it's Count Seven --

THE COURT: Yes --

MR. McEVOY: -- and --

THE COURT: -- I just saw that as well. Go ahead.

MR. McEVOY: And the other thing is that -- and this will eventually come out either in motion practice on a motion to dismiss or as the case goes along, Dr. Weller negotiated this agreement to the fare-thee-well. There are an endless number of emails between Dr. Weller and people at the hospital, this provision isn't good, this provision is illegal, this provision violates my rights, and at the end of the day he signed the agreement that has the provision I just quoted. So it's a little hard to now hear, oh, but, gosh, it shouldn't be held against me that this provision now has different meaning than what I agreed to.

THE COURT: Right. No, I understand. I think that was in your letter that there was a marked up copy of the agreement sent back.

MR. McEVOY: Yes.

THE COURT: Again, I'm just trying to counsel for efficiency and conservation of resources for both sides. So, Mr. Weller, I cannot prevent you from putting into your complaint whatever claims you want, just like I can't prevent Mr. McEvoy from moving on whatever bases he wants to dismiss, but I'm just giving you my assessment of whether your noncompete claim, which is a freestanding claim and also relating to your Sherman Act claim will survive. I really don't think it will, based on the facts you've alleged, and putting aside any evidentiary sort of -- or evidentiary defense that there might be down the road, which I won't take into account.

But you're your own counsel so you'll decide to do whatever you wish. Just tell me how much time you want to amend.

MR. WELLER: Fourteen days would be fine for me.

THE COURT: We'll give you 14 days from now, which is what date, Fida?

MR. McEVOY: It should be November 14th.

THE COURT: That's right, November 14th.

MR. McEVOY: Today is Halloween.

THE COURT: Well done. November 14th. How much time -- I'm assuming you'll still -- let's put it this way. You can file your motion 30 days from then, if you like,

Mr. McEvoy, or file a letter indicating that you're not moving to dismiss if for some reason Mr. Weller trims his complaint in a way that makes you think it's not worth that effort right now.

MR. McEVOY: So thirty days would be December 14th.

THE COURTROOM DEPUTY: Fourteenth.

MR. McEVOY: That's fine.

THE COURT: Then I'll give you 30 days to respond with some -- probably two weeks maybe for the holidays, Mr. Weller.

So five weeks, Fida.

THE COURTROOM DEPUTY: Five weeks takes us to January 13th, that pushes us to January 19th.

THE COURT: January 19th for the response to any motion to dismiss, then two weeks for any reply.

MR. McEVOY: Fair enough.

THE COURTROOM DEPUTY: February 2nd.

THE COURT: Good. All right.

The way I operate, and you have probably heard this, Mr. McEvoy, there's something called bundling. What it means is you don't file your motion, Mr. McEvoy, until the last day on which your reply is due, then you file both your motion and your reply, but you serve Mr. Weller on the first date, the one in --

MR. McEVOY: December.

THE COURT: -- December. And then file your letter, cover letter indicating that you've served Mr. Weller so that we know that you're complying with the schedule.

Similarly, Mr. Weller, you'll file -- you won't file your opposition until that final day in February, but you will serve Mr. McEvoy with your opposition, and then just file your letter indicating that you have served Mr. McEvoy. You don't have to follow this practice, but it makes it easier for me to give you extensions of time should either side want it and both of you hopefully will agree to it, because you won't be running up against my internal deadlines to rule on the motion, which are triggered by the actual filing of the motion.

So if we wait until everything is briefed, so it's referred to as bundling just for your education, Mr. Weller, if you follow the bundling practice, the time for me to resolve the motion won't start until it's fully briefed, and like I said, then it makes it easier for me to give you some extensions before then.

MR. McEVOY: Your Honor, there will be an order on ECF?

THE COURT: Correct, with all the deadlines and then recapitulating this bundling notion, this noncompulsory bundling notion.

MR. McEVOY: Okay.

THE COURT: Okay? Thank you both. Pleasure meeting you. Look forward to hearing from you.

MR. McEVOY: Thank you.

(Matter concluded.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ Georgette K. Betts — November 6, 2023

GEORGETTE K. BETTS — DATE